

Scottish Law and the victims of asbestos (by James Kelman)

A unique event in Scottish legal history did not take place in Edinburgh's Court of Session last Thursday. Mr Patrick McCrystal did not become the first mesothelioma victim to hear his case championed in a Scottish court. But the proceedings that did occur demonstrate the absurdity of the concept 'justice': this in respect of the fight through the legal system by Scottish victims of asbestos-related industrial disease, against those responsible for inflicting them with progressive, ultimately terminal illnesses. Mr McCrystal's life and imminent death was settled against his wishes in an out-of-court financial deal between his legal representation and that of the Defenders. Supported by the charity of which he is a member it had been his intention to take the case all the way. This proved impossible.

In early August Mr McCrystal was given four months to live by a Glasgow-based specialist in respiratory disease. For the lay observer the out-of-court settlement occurred in the most shabby manner. He suffers the horrific asbestos-disease mesothelioma. Outside the West of Scotland and certain other parts of the world it is regarded as a rare terminal illness. In the Glasgow area its incidence is nearly 8 times ^{higher} than the UK average. This is the 'official' figure. The disease has the reputation of being notoriously difficult to diagnose. The actual figures could be much higher. 20,000 shipyard workers alone are known to have contracted asbestos-related disease since the end of the 2nd World War.

Mr McCrystal's case was funded by his union, the GMP, whose lawyers are the respected firm of Robin Thompson. In the opinion of Mr McCrystal he was browbeaten into the financial settlement by his legal representation, his lawyer and QC. The use of terms such as 'browbeaten' must be used warily in respect of the legal profession. It is hoped that the account which follows will justify the term.

Mr McCrystal, his friends and fellow members of Clydeside Action on Asbestos (90% of whom are also victims

1. Pat used this term himself

of asbestos-related disease) were prepared for the worst. The majority have their own cases in process - progress is not the right word; the system generally rolls for four or more years. These people had predicted the end result. And unlike his lawyer Mr McCrystal was not surprised for the 'astonishing' last-minute news that his appointed QC was set to resign from the case. Even so, he and his friends were rendered powerless by what they describe as 'legal blackmail'.

The Defenders had accepted liability. Thus there was 'no case'. This establishes that some of the more illustrious Clydeside names, eg. Fairfield, Plythswood Shipbuilding, Harland and Wolff, exposed their workforce to a deadly fibre and that they did so knowingly. In consequence Mr McCrystal, like so many other exshipyard workers, will shortly be dead.

The first cash payment offered to Mr McCrystal in lieu of compensation was £18,000. He rejected this and also rejected the second sum of £22,000. A week before his scheduled court appearance the offer was increased dramatically to £50,000. He rejected this and again stressed to his solicitor that the money was immaterial; he sought 'justice' rather than financial compensation.

Two days before the court appearance he was called through to Edinburgh for a meeting with his union lawyer and QC. The meeting lasted some 2½ hours. The offer of £50,000 was confirmed and he was advised this was the very best he could hope for. Again he stressed his position. By 'justice' he meant that the full guilt of his former employers would not only be revealed in public but become subject to some form of court ruling that might aid other asbestos victims. He stated clearly that the fight was not simply on his own account but those thousands of workers who suffer, and will continue to suffer - a fate similar to his own.

It was evident that those professionally involved were unable to grasp the point. It was explained to him that civil actions were about money and if he wanted justice he should 'go to Parliament'. He was also advised that the

court was not the place for 'feuds' (a strange legal euphemism for the submission that one party may have poisoned another to his certain death). Mr McCrystal remained adamant.

During the days prior to his scheduled court appearance and on the morning itself, there was great activity on the part of his lawyer. The financial settlement had to be delineated item by item and £1 for £1 in the way that such things occur. Mr McCrystal did mention in passing that there had been a full six months in which this business could have been conducted. In view of his fast deteriorating physical condition coupled with the current psychological stress, he was not in the best state to deal with it at this late stage in the proceedings.

The day before the hearing he was again asked what sort of settlement figure he had in mind. He suggested to the lawyer that since they had filed for a sum of £100,000 originally they should ask for that. (He told me later that he had regretted mentioning a figure at all but he was tired and the pressure was getting to him.) His lawyer then advised him they always filed for this sum, that it was a formality, but to ask for such a sum in real life was outwith the bounds of reason.

The court hearing was scheduled for 9.45 on Thursday morning. At 6.30 a.m. his lawyer phoned, requesting certain information and again asking what sort of sum of money he had in mind. He replied that he was 'going to court'. Three hours later, in company with his niece and a group of friends and fellow asbestos victims he arrived in the hallowed halls of justice Scottish-style, Parliament Square, Edinburgh.

The negotiations moved up a gear. It was now explained to Mr McCrystal that there were two unfortunate factors in his case which would perhaps entail a reduction in the settlement. One factor had been worked out at £5000. Mr McCrystal accepted this 'loss'. The other factor concerned 'future loss of earnings'. Upon his retiral he was asked by his then employer if he would consider working on until he was 70. Mr McCrystal had agreed. It was now

suggested by his legal representation that his employer had only offered him an extra few months employment. This was an important consideration and if true it meant another drop in any settlement figure. Because of this the £50,000 was an extremely good offer and if he went through with the court hearing it was likely that the 'in-court' figure would be substantially less.

As an added bonus to the 'out-of-court' settlement the Defenders would admit their liability. Mr McCrystal was further advised that 'they' were not too enamoured with the media's interest in this potentially unique moment in Scottish legal history; tactically such public interest might prejudice his case, but was unable to explain satisfactorily why this might be true, nor who the 'they' referred.

Things had become fairly hectic by now and the impression was gained that this 'out-of-court' settlement would be announced in court. Thus although it was 'out-of-court' it had all the trappings of the 'in-court'. This was a difficult point to have clarified. But eventually it was clarified, this final offer would be announced in court but would remain classified 'out-of-court'. But all in all, according to his legal representation, Mr McCrystal had achieved what he had set out to do and thus would be said to have 'won'.

Neither Mr McCrystal nor his friends and fellow victims could quite grasp the nature of this 'victory'. In their long experience of the horse-dealing operation that we call Scottish Civil Law this was yet another stitch-up, this time in the form of a 'ringer'; the 'out-of-court' being sold for an 'in-court'. Mr McCrystal declined the offer, for six months he had prepared for court and he would go through with it come what may. His lawyer departed for further consultation with the QC. At this point Mr McCrystal and the other experienced asbestos victims predicted the QC would now withdraw from the case. Further, that his lawyer would suggest they might be forced to withdraw also, for one reason or another.

From the first meeting two days prior to the hearing right the way through the morning in question counsel for the union lawyer, Mr Graham Fleming QC, had refused point blank to allow any of Mr McCrystal's friends present during discussion. Never at any time was the fact of Mr McCrystal's condition taken into account. He reminded that the mean life expectancy for male mesothelioma victims is six months from diagnosis. This courageous and determined man was diagnosed back in February.

The culmination arrived. Mr McCrystal's QC gave him the offer he couldn't refuse, he was duty bound to withdraw from the case if the 'out-of-court' settlement was rejected.

The union lawyer said this had never happened before. It was explained to her that this is not uncommon practice by any means. A couple of months ago another asbestos victim who had expected a settlement of £70,000 was obliged to accept less than £10,000 when faced by the same ultimatum. But in the event of Mr Graham Fleming's withdrawal would it be possible to hire another counsel? Not really.

Now came the additional factor, that although the lawyer was acting for Mr McCrystal her firm - Robin Thompson - was funded by his union, the GMB. The GMB might be unable to continue funding the case if the 'out-of-court' settlement was refused, working on the assumption that the 'in-court' figure would prove the lesser. (The GMB receives 10% of the settlement figure.) But we must remember that not one single solitary victim of this horrific industrial disease has ever heard a case championed in court. Surely Mr McCrystal's union would support the fight to have a full court hearing on a matter of such unprecedented importance for the Scottish trades union movement? Well, such an attitude couldn't be taken for granted. And the costs still to come were fairly high; even calling the witnesses, for example, doctors were 'expensive'. However, the lawyer left to phone the GMB and find out the situation.

Mr McCrystal and Clvdeside Action on Asbestos now had to plan what to do in the event of being left stranded. He and his friends had talked around this probability for the

past two days but were unable to find a satisfactory alternative. This is a self-supporting charity funded almost exclusively by donations from its members and sympathisers. Was it conceivable that the money could be raised in the event of the GMB's withdrawal? Could any of the members fight the case on behalf of Mr McCrystal? Or would 'they' not allow it. Such things are possible in criminal law but what about civil law? And if it was possible there was no time left to prepare an adequate submission.

Besides which some professional, legal advice seemed essential. There was no time to go to the library and read up on the subject. The irony of being in the vast hall of Edinburgh's Court of Session, surrounded by the silks and gowns of the legal profession. Yet the possibility of requesting legal advice was advanced only as a joke, when one of the group spotted the Dean of Faculty in a conversational walk with a colleague.

If Mr McCrystal went into court the only practical route lay in a request for a new hearing in light of the 'unusual' circumstances. This would allow time to come up with some realistic alternative.

However, it was now noticeable that the Mr McCrystal was very tired. Given the inner strength that has sustained him these last months there remains the physical reality of his condition. Most asbestos victims experience progressive lung death. Breathing is a constant struggle.

And there is always the 'Scottish' factor to consider, the 'effect of death on damages': under Scottish Law if Mr McCrystal had died before settlement then the bulk of the claim would die with him. Bearing in mind that ALL asbestos-related diseases are incurable this is the trump card faced by every last Scottish victim. Mr McCrystal confessed that he would be dead by the time of the new hearing. He was obliged to concede defeat. There was no alternative.

The lawyer was instructed to inform the QC that he need not withdraw from the case, the settlement figure had been accepted 'out-of-court' by their client. In the flush

of this neither Mr McCrystal nor anyone from Clydeside Action on Asbestos can recollect the outcome of the lawyer's phonecall to the GMB.

At 11.45 a.m. the court assembled to hear news of the settlement. Both counsels spoke for a brief period. The Judge also spoke. The counsel for the Pursuer asked for it on record to the effect that Mr McCrystal was a courageous man. The counsel for the Defenders asked for it on record to the effect that his clients had shown their gracious consideration of Mr McCrystal's imminent death by allowing this early hearing. Etc. Etc. In fact the speed of this court hearing was the only thing unique about last Thursday's events in Parliament Square and may have had something to do with the recent media interest in Mr McCrystal.

But what cannot be forgotten is the disclosure of liability. The hard reality is that these famous Clydeside shipbuilders were aware of the deadly effects of asbestos exposure but took no precautions to safeguard their tens of thousands of employees. The British government itself was aware of the terrible dangers. In 1898 factory inspectors were already expressing concerns about 'the evil effects' of asbestos dust. Only ten years later 'a Parliamentary Commission confirmed the first cases of asbestos deaths in factories and recommended better ventilation and other safety measures'. As far back as 1929 the world's largest asbestos corporation, the US-based Johns Manville, was served with writs by asbestos victims. The claims were settled 'out-of-court' with 'secrecy orders'.

In Scotland nothing much has changed except the public disclosure of liability. There seems no process in law by which guilty people can be brought to account for their blatant disregard of human life. For the victims of asbestos the first step in that long judicial process is to take a case to court. At present there is no possibility of that. No matter the opinion of the Scottish legal profession the only victory on Thursday belonged to themselves and the Defenders. For the victims of asbestos it was one more nail in the coffin.

